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IN THE COURT OF APPEALS OF INDIANA

EDDIE MOONEY,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0612-CR-1106
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause No. 48C01-9907-CF-191
48C01-0606-FD-255

May 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Eddie Mooney appeals his three-year sentence for sexual battery, a Class D felony. Mooney also challenges the trial court's order that, due to his probation violation, he serve the five-year sentence that was previously suspended following a Class B felony attempted rape. We affirm.

Issues

Mooney raises two issues for our review:

I. whether the trial court properly sentenced him; and

II. whether the trial court properly ordered him, as a result of his probation violation, to serve his five-year suspended sentence.

Facts

On March 1, 2000, Mooney pled guilty to attempted rape, and the trial court sentenced him to ten years imprisonment with five years suspended. Mooney began serving probation in 2004.

The Sturdivant family hired Mooney, who was using an alias, to mow the yard at their Anderson home. On June 27, 2006, Mooney was at the Sturdivant residence, and eleven-year-old J.M. was there as well. Mooney called J.M. over to him. As she approached, he put his arm around her and grabbed her on or near her hip or buttocks. J.M. told detectives that she feared Mooney was going to rape her.

On June 28, 2006, the State filed an information alleging that Mooney committed Class D felony sexual battery and that he was a repeat sex offender. On July 5, 2006, the State also filed a petition alleging that Mooney violated the terms of his probation.

Mooney pled guilty on July 19, 2006, to the sexual battery charge and admitted that he violated the terms of his probation. The State dismissed the charge alleging that Mooney was a repeat sex offender.

The trial court sentenced Mooney to three years on the sexual battery charge and ordered that he serve all of his previously suspended five-year term. Mooney appeals.

Analysis

I. Sexual Battery Sentence

Mooney first argues that the trial court improperly sentenced him to serve three years for his Class D felony sexual battery conviction. We disagree.

Mooney committed this offense after our legislature replaced the "presumptive" sentencing scheme with the present "advisory" sentencing scheme. We are awaiting guidance from our supreme court as to how, precisely, appellate review of sentences under the new "advisory" scheme should proceed and whether trial courts must continue issuing sentencing statements explaining the imposition of any sentence other than an advisory sentence. See Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006). This court has split on the issue of whether such statements still must be issued. Compare Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006), trans. denied (holding that a trial court is under no obligation to find or weigh any aggravating or mitigating circumstances) with McMahon v. State, 856 N.E.2d 743, 749 (Ind. Ct. App. 2006) (holding sentencing statements must be issued any time trial court deviates from advisory sentence).

Whether or not sentencing statements are required, it has been universally recognized that such statements are very helpful to this court in determining the appropriateness of a sentence under Indiana Appellate Rule 7(B). Gibson, 856 N.E.2d at 147. The trial court here did issue a sentencing statement, and we will utilize it to assist us in determining whether the sentence imposed here was inappropriate. Id. Under Indiana Appellate Rule 7(B), we may revise a sentence that we conclude is inappropriate in light of the nature of the offense and the character of the offender. We perform this review while considering as part of that equation the findings made by the trial court in its sentencing statement. We understand that this is, by necessity, part of our analysis here, but it does not limit the matters we may consider. See Gibson, 856 N.E.2d at 149; see also McMahon, 856 N.E.2d at 750 (noting that review under Rule 7(B) is not limited "to a simple rundown of the aggravating and mitigating circumstances found by a trial court.").

In issuing its sentence, the trial court found one aggravating factor, Mooney's prior criminal history, which consisted of the attempted rape of a fourteen-year-old girl. The trial court stated that the mitigating factors included that Mooney expressed remorse and pled guilty, which spared the victim from the necessity of testifying in court. The court concluded that the aggravating factor outweighed the mitigating factors because his "entire record is nothing but sexual assaults against children. . . ." Tr. p. 43. The court also noted that by pleading guilty, the State dropped the repeat sex offender charge, which, upon conviction, would have resulted in an additional one and one-half year sentence. Tr. p. 40.

Mooney argues that the trial court improperly considered his prior criminal history in weighing the aggravating and mitigating circumstances. Mooney specifically objects to the trial court's consideration of his prior criminal history because the repeat sex offender count had been dropped as a result of the plea agreement.

Indiana Code Section 35-38-1-7.1(a)(2) provides that "[i]n determining what sentence to impose for a crime, the court may consider the following aggravating circumstances: . . . The person has a history of criminal or delinquent behavior." In considering the aggravating factors, the trial court discussed Mooney's prior conviction for the attempted rape of a fourteen-year-old girl. The trial court was not considering the dismissed repeat sexual offender charge; rather, it was considering Mooney's prior criminal behavior, as it is statutorily permitted to do. The trial court found it "very troubling" that Mooney would commit another sexual offense against a young girl. Tr. p. 43. The trial court's consideration of this aggravating circumstance was proper.

Mooney analogizes this case to Conwell v. State, 542 N.E.2d 1024 (Ind. Ct. App. 1989). In Conwell, the State charged a defendant with Class B felony burglary, but under a plea agreement the defendant pled guilty to Class C felony burglary. In sentencing the defendant, the trial court relied on the facts that distinguished the greater offense from the lesser offense. This court held that "a trial court may not attempt to sentence as if the defendant had pled to the greater offense by using the distinguishing element(s) as an aggravating factor." Conwell, 542 N.E.2d at 1025. See also Miller v. State, 709 N.E.2d 48, 50 (Ind. Ct. App. 1999) (holding that it was inappropriate for a trial court to consider as an aggravating factor subsequent charges that had been dismissed through a plea

agreement); Farmer v. State, 772 N.E.2d 1025, 1027 (Ind. Ct. App. 2002) (holding that it was improper for the court to rely on facts that supported charges which had been dismissed as part of a plea agreement).

These cases are not analogous. The trial courts in Conwell, Miller, and Farmer erroneously relied on charges or facts under which the defendants had not been convicted. In contrast, while sentencing Mooney, the trial court considered the facts of a charge under which Mooney had actually been convicted. Mooney's plea of guilty to the prior attempted rape charge acknowledged that those factual allegations were true; whereas the facts relied upon by the trial courts in Conwell, Miller, and Farmer were unsubstantiated. The trial court's consideration of Mooney's prior conviction was appropriate and in compliance with the law.

Mooney also asserts that by entering a plea of guilty, the State has received a substantial benefit, and Mooney "deserves to have a substantial benefit extended to him in return." Appellant's Br. p. 11 (citing Williams v. State, 430 N.E.2d 759, 764 (Ind. 1982)). Mooney did receive a substantial benefit; his plea of guilty resulted in the State dropping the repeat sex offender charge, which would have led to an additional one and one-half year sentence. Thus, the mitigating weight of Mooney's plea is not overwhelming.

Mooney next argues that the sentence was inappropriate in light of the nature of the crime and his character under Indiana Appellate Rule 7(B). He asserts that the nature of the crime is "low level sexual misconduct" that does not justify a maximum sentence. Id. at 12. In light of the defendant's character, however, we think the maximum sentence

of three years is justified. The defendant previously attempted to rape a fourteen-year-old girl and was only prevented from doing so because a witness responding to the victim's screams kicked Mooney in the head. Now the defendant has admitted to placing his hand on the buttocks of an eleven-year-old girl in a sexual manner in such a way that she feared being raped. These considerations lead us to conclude that the maximum sentence is appropriate.

II. Suspended Sentence

Mooney argues that it was an abuse of discretion for the trial court to revoke his probation and require him to serve his entire five-year suspended sentence. A trial court's decision to revoke probation is reviewed for an abuse of discretion. Podlusky v. State, 839 N.E.2d 198, 200 (Ind. Ct. App. 2006). An abuse of discretion occurs if "the decision is clearly against the logic and effect of the facts and circumstances." Ables v. State, 848 N.E.2d 293, 296 (Ind. Ct. App. 2006).

As part of his plea agreement, Mooney admitted to the probation violation. Upon a violation of probation, the court may: (1) continue the person on probation, with or without modifying or enlarging the conditions; (2) extend the person's probationary period for not more than one (1) year beyond the original probationary period; or (3) order execution of all or part of the sentence that was suspended at the time of initial sentencing. I.C. § 35-38-2-3(g).

The trial court made the determination that Mooney should serve the entire five-year suspended sentence. Mooney argues that the trial court abused its discretion because this was his first probation violation, he had been released for nearly two years before

committing this offense, and the offense was a "minor act of groping." Appellant's Br. pp. 14-15. Due to the sexual nature of this offense and the defendant's previous sexual criminal history, it was not an abuse of discretion for the trial court to require Mooney to serve his entire five-year suspended sentence.

Conclusion

It was not improper for the trial court to consider the defendant's prior criminal history as an aggravating circumstance in determining his sentence. The sentence imposed by the trial court was appropriate, and it was not an abuse of discretion for the trial court to require the defendant to serve his previously suspended sentence as a result of his probation violation. We affirm.

Affirmed.

BAILEY, J., and VAIDIK, J., concur.